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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

CLARK SHERWOOD OIL FIELD CONTRACTORS, ET AL,

Petitioners,

versus

IRENE HANKS SMITH, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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This is a joint petition for writ of certiorari filed on behalf of Quintana Petroleum Corporation, Employers Mutual Liability Insurance Company of Wisconsin and Clark Sherwood Oil Field Contractors, Inc., as authorized by Supreme Court Rule 23.

Petitioners pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered February 9, 1972, rehearing denied April 17, 1972.

CITATIONS TO OPINIONS BELOW

The judgment of the United States District Court for the Western District of Louisiana, Lafayette Division

in the case entitled "Rodney Smith, et al v. Clark Sherwood Oil Field Contractors, et al," Number 12890 on the docket of that court, is not reported but appears in the appendix filed in the United States Court of Appeals for the Fifth Circuit at pages 71, 72 and 73, the findings of fact, conclusions of law and judgments of the court are also not reported and appear at pages 56-60 of the appendix; the April 16, 1970 ruling of the District Court which delineated the amount and type of intervention allowed by that Court appears at pages 33-36 of the appendix; the foregoing rulings of the District Court are printed in Appendix A hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit, dated February 9, 1972 is officially reported at 457 F.2d 1339 (CA 5-1972) and is printed in Appendix B hereto. The denial of petitioner's timely application for a rehearing en banc is printed in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was made and entered in this case on February 9, 1972 and a timely application for rehearing en banc was denied on April 17, 1972. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

As of the date of the printing of this petition for a writ of certiorari petitioners have applied for an extension of time within which to petition for certiorari but no ruling has been received from the court and therefore the date of the order granting the extension, if

granted, cannot be included herein. The original time o file the petition expires on July 17, 1972 and it is expected that the petition will be filed by then.

QUESTION INVOLVED

Did the Congress of the United States intend that he lawfully appointed personal representative of a deceased seaman or railroad employee be the sole party nvested with the exclusive authority and power o prosecute a claim for the alleged wrongful death of a seaman under the Jones Act, 46 U.S.C.A. 688, et seq., incorporating by reference the F.E.L.A., 45 U.S.C. 51 et seq., or did the Congress intend that this authority be exercised by a committee of beneficiaries?

Phrased differently, the question presented is whether or not any person claiming to be a beneficiary for the alleged wrongful death of a seaman can obstruct the compromise of a suit filed on her behalf, thus requiring unanimous approval of all beneficiaries or does the personal representative have the authority to dispose of the litigation in the manner he deems most advantageous to all of the beneficiaries?

STATUTES INVOLVED

Pertinent portions of the Statutes involved are:

1. The Federal Employers Liability Act, 45 U.S.C. 51-59

"§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees for negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages for any person suffering injury while he is employed by such carrier or in such commerce, or in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; ..."

2. The Jones Act, 46 U.S.C. 688 et seq.,

"§ 688 Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injuries the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the

United States conferring or regulating the right of action for death in the case of railway employees shall be applicable . . ."

STATEMENT OF THE CASE

The essential facts of this case are that one John B. Smith met his death while performing work for Clark Sherwood Oil Field Contractors and Quintana Petroleum Corporation. At the time, he was still married to Irene Hanks Smith, and of this marriage were born four minor children. At the time of his death, he had been separated from Irene Hanks Smith for some three years and she was living with the four minor children in Houston, Texas.

At the time of his death, and for the two prior years, he lived with Carol Carpenter and of this union was born one child, Cheryl Ann Smith. Irene Hanks Smith contests the paternity of Cheryl Ann Smith.

Following the death of decedent, his brother, Rodney Smith, applied for and was appointed administrator and personal representative of John B. Smith and the beneficiaries named in the Jones Act, 46 U.S.C. 688. Thereafter, Irene Hanks Smith attacked this appointment in the state courts of Louisiana but the appointment of Rodney Smith was sustained in *Succession of Smith* reported at 219 S.2d 291 (3d Cir.-1969).

Irene Hanks Smith then returned to Houston, obtained an appointment in Harris County, Texas, as temporary administratrix and filed a separate suit

in Texas. She then intervened in this proceeding claiming that her interests were adverse to Rodney Smith.

Thereafter, on stipulations entered into by Rodney Smith together with the deposition of Irene Hanks Smith, affidavits and other documents of record, the matter was compromised for a total of $50,000, $29,000 being allocated to Irene Hanks Smith and her four children, $21,000 being allocated to Cheryl Ann Smith, who was four weeks old at the death of John B. Smith.

The judgment of the District Court approving this settlement was appealed by Irene Hanks Smith. The appeal was transferred to the Summary Calendar of the Court of Appeals for the Fifth Circuit and, without any opportunity for real argument, a divided panel of that Court reversed the judgment on the basis that Rodney Smith could not adequately represent the interests of all parties and the further basis that there were unresolved factual disputes in the record. Application for rehearing en banc was denied April 17, 1972.

REASON FOR GRANTING THE WRIT

This decision of the Court of Appeals for the Fifth Circuit is contrary to decisions of the Second Circuit in *Civil v. Waterman Steamship Corporation*, 217 F.2d 94 (CA 2-1954) and *Moore-McCormack Lines v. McMahon*, 235 F.2d 142 (CA 2-1956) as well as the decision of the Seventh Circuit in *Stark v. Chicago Northshore & Milwaukee Railway Company*, 203 F.2d 786 (CA 7-1953) and the decisions of this Honorable Court in *American Railway Company of Porto Rico v.*

Birch, 224 US 547, 32 Sup.Ct. 603, 56 L.Ed. 879 (1912); *St. Louis, San Francisco, and Texas Railway Company v. Seale*, 229 US 156, 33 Sup.Ct. 651, 57 L.Ed. 1129 (1913).

All of the aforementioned courts have held that the personal representative is the only individual who is authorized to conduct and prosecute litigation brought for the death of a seaman, whereas the Fifth Circuit in this case has held that the personal representative does not have that power but, instead, has the power subject to the willingness of the various beneficiaries to allow him to exercise it.

As noted above, this action of the Fifth Circuit was taken by a divided panel with a written dissent and without the benefit of oral argument as the case was transferred to the Summary Calendar.

The paramount legal issue involved herein is whether the actions of the personal representative in the conduct and prosecution of litigation brought for the death of a seaman, including the power to terminate that litigation by compromise and settlement, are subject to monitoring by some or all of the beneficiaries so that none of his actions taken in connection with the prosecution of said claims can have any binding force or effect unless and until prior approval and unanimous consent of all beneficiaries to that action has been obtained.

To put the matter another way, is this to be litigation by committee with the personal representative as Chairman with no power to act in any way, shape or form in connection with the prosecution and handling

of the litigation except by unanimous or majority consent of the committee of beneficiaries or is he and he alone vested with the sole responsibility and concomitant power to handle and prosecute the litigation and ultimately dispose of it by trial or settlement as he deems fit and proper with the beneficiaries' remedy in case of dispute or disagreement being an action over against the personal representative for failure to adequately perform his fiduciary duties?

We submit that the answer to this question is and must be that the sole power and authority to commence and prosecute the litigation and ultimately dispose of it by trial or settlement must be vested in the only person with standing to sue, the personal representative of the decedent seaman, as reflected by the jurisprudence to be discussed hereinbelow; otherwise chaos will result. He and he alone is legally vested with standing to sue and prosecute the claim.

The Fifth Circuit has held otherwise and by its action in judicially recognizing the standing of one of the beneficiaries to intervene on her own behalf has effectively nullified the powers of the office of personal representative which by congressional action has been vested with the sole responsibility and power to prosecute the claims asserted herein.

Further, this action of the Fifth Circuit serves to encourage a multiplicity of litigation in diverse jurisdictions with each surviving beneficiary retaining personal counsel and filing a separate suit or intervening in existing suits, wherever they may reside and can get jurisdiction over the defendant, as exemplified by

this very action herein where Irene Hanks Smith has filed not only an intervention in this proceeding but a claim under the Jones Act in State District Court in Texas against only one of the defendants herein, Quintana Petroleum Corporation.

It is for this very reason that the jurisprudence has uniformly held, as seen hereinbelow, that the personal representative of the deceased, and only the personal representative of the deceased has standing to sue and prosecute the claim which necessarily carries with it the power to make whatever stipulations he deems necessary in order to successfully prosecute same and to bring it to a conclusion by either trial or compromise as he deems fit and proper in the interest of all of the surviving beneficiaries of the decedent seaman.

The Jones Act, 46 U.S.C.A., Sec. 688, merely incorporated by reference the Federal Employers' Liability Act, 45 U.S.C., Sec. 51-59, and carried it over to the field of Maritime Law to be applied against employers and in favor of employees who are denominated seamen and members of the crews of vessels. Thus it is the latter Act to which we must look for the specific provisions containing the congressional intent as to the statutory remedy asserted herein under the Jones Act upon which the judgment of the Lower Court was based.

Section 1 of the Federal Employers' Liability Act, 45 U.S.C., Sec. 51 provides that the employer "shall be liable in damages" to any employee suffering injury, "or, in case of the death of such employee, to his or her personal representative, for the benefit of

the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment."

As recognized by the District Court in its ruling of April 16, 1970, attached hereto in Appendix "A", the word "children" in the above quoted portions of the Federal Employers' Liability Act includes natural or illegitimate children as well as legitimate children so that natural children such as Cheryl Ann Smith are also beneficiaries under the act. See *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968) and *Hebert v. Petroleum Pipe Inspectors, Inc.*, 396 F.2d 237 (CA 5-1968).

A review of the jurisprudence under the Federal Employers' Liability Act will reveal that almost from its inception the Federal judiciary, including this Honorable Court has consistently held that the beneficiaries of deceased railway employees cannot bring, in their own names, an action for damages pursuant to the Employers' Liability Act of April 22, 1908, otherwise known as the Federal Employers' Liability Act, because of the fact that under that Act only the personal representative is empowered to prosecute the action granted by the statute.

For instance, in *American Railway Company of Porto Rico v. Birch*, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879, (1912) the decedent railroad employee's widow and son brought suit against the defendant railroad in their own names for his alleged wrongful death to which a demurrer was filed by the railroad on the grounds that they had no standing to sue as neither had been confirmed as personal representative of the decedent. No administration proceedings had been had on the estate of the deceased. Over objection by the railroad on the trial it was shown that the deceased left no other heirs, beneficiaries or survivors but the plaintiffs. From an adverse judgment in the Lower Court, the railroad appealed. In reversing the decision of the Lower Court, this Honorable Court noted that the Lower Court erred in overruling the motion of the railroad company for direction of a verdict.

The railroad's motion was based on the grounds that the suit was not brought by any person authorized under the National Employers' Liability Act to bring suit. In overruling this contention the Trial Court stated that inasmuch as the suit was being brought under the Act of Congress of April, 22, 1908 (the Federal Employers' Liability Act), it was properly brought in the name of the only persons for whose benefit any recovery could be had. It was the opinion of the District Court that the words used in Section 2 of the Act in question "to his or her personal representative" could not be construed to mean that it was necessary to have an administrator appointed in cases where only the husband or wife could have inherited and were the only survivors as this would force such an appointment even in the absence of any estate belonging to the deceased

other than his right to sue. In disapproving this ruling of the Lower Court and in reversing the judgment against the railroad and dismissing same as of non-suit because of the failure of the action to be brought by any party legally empowered to do so, this Honorable Court noted:

> "But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured or, 'in case of his death, * * * to his or her personal representative'. It is true that the recovery of the damages is not for the benefit of the estate of the deceased but for the benefit 'of the surviving widow or husband and children'.
>
> "By this distinction between the parties to sue and the parties to be benefited by the suit made clear the purposes of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case, it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and *keep the controversy free from elements but those which relate to the cause of action.* But, we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used." (emphasis added)

Again, in *St. Louis, San Francisco & Texas Railway Co. v. Seale*, 229 U.S. 156, 33 S.Ct. 651, 57 L.Ed. 1129, (1913) an action was brought against the defendant railroad by the widow and parents of one of its deceased employees in State Court in Texas under the Texas Wrongful Death Act. The railroad demurred or excepted to the petition of plaintiffs on the grounds that the entire action was controlled by the Federal Employers' Liability Act and, as such, none of the plaintiffs had standing to prosecute the action as none were the personal representative of the deceased. This was denied by the Texas Appellate Court. Writs were applied for and granted by this Honorable Court which reversed the decision of the Texas Courts holding that the exclusive remedy of the beneficiaries and survivors of the deceased railroad employee was under the F.E.L.A. and, as such, only the personal representative of the deceased could bring the action and had standing to sue for the death of the employee.

The foregoing F.E.L.A. jurisprudence is particularly applicable in this case since, by the provisions of the Jones Act, 46 U.S.C. 688, et seq., the F.E.L.A. is incorporated as the approved remedy for seamen.

Thus, carrying the matter over into Maritime Law, we find *Lindgren v. United States*, 281 U.S. 38, 50 S.Ct. 207, 74 L.Ed. 686 (1930) which is squarely in point and still good law on the question of who has authority to sue under the Jones Act for the death of a seaman resulting from the negligence of his employer or its agents and employees. In speaking of the Jones Act, this Honorable Court stated:

> "The Federal Employers' Liability Act, which was incorporated in the Merchant Marine Act by reference, related to the liability of common carriers by railroad to their employees in interstate and other commerce as specified."

After setting forth the pertinent provisions of the Federal Employers' Liability Act, as carried over into the Maritime field by virtue of the Jones Act, the Court held:

> "By this section if the injury to the employee results in death, his personal representative — while not given any right of action in behalf of the estate — is invested solely as trustee for the designated survivors with the right to recover for their benefit such damages as will compensate them for any pecuniary loss which they sustained by the death."

It is apparent from the above quoted portions of the decision in *Lindgren* that the sole person vested with the authority to bring an action under the Jones Act is the personal representative of the decedent, in this case, Rodney Smith. The action is not personal to him but brought by him as trustee not on behalf of the estate but on behalf of the designated survivors. If he should breach that trust, then ipso facto, an action lies against the trustee for breach of his fiduciary duties.

Bringing this line of jurisprudence down to the District Court from which this case emanated, we find

that the decision in *Phillips v. Houston Fire & Casualty Insurance Company,* 219 F.Sup. 420 (W.D. La.-1963) is very apropos to the issues involved herein. On facts not germane to the issues posed by the case at bar, Judge Putnam, as organ of the Court, had this to say concerning the standing to sue, if any, of beneficiaries of the F.E.L.A. for the death of the decedent railway employee involved therein:

> "The beneficiaries themselves, unlike the survivors listed in LSA-C.C. Art. 2315, have no individual right of action, the liability of the railroad being to the personal representative of the decedent for the benefit of the survivors. 45 U.S.C.A., Sec. 51, Savaria v. United States R.R. Assn., 151 La. 156, 91 So. 661; Ott & Prados v. New Orleans Coal & Bisso Towboat Company, La.App. 55 So.2d 614; St. Louis, S.F. & T.R.Co. v. Seale, 229 U.S. 156, 33 S.Ct. 651, 57 L.Ed. 1129."

Indeed, as shown by the case of *Savard v. Marine Contracting, Inc.,* 296 F.Supp. 1171 (DConn.-1969) even if Irene Hanks Smith and her children had joined Rodney Smith as co-plaintiffs in bringing the Jones Act suit initially brought herein by Rodney Smith alone, they would have had to have been dismissed as parties plaintiff because of their lack of standing or capacity to prosecute the claim in their own right. As shown by the *Savard* case, supra, the Jones Act claim asserted therein was ordered amended so as to eliminate the statutory beneficiaries and retain only the decedent's widow in her capacity as the decedent's personal representative. (296 F.Supp. at 1176).

Finally, in *Stark v. Chicago, North Shore and Milwaukee Railway Company*, 203 F.2d 786 (CA 7-1953) an action was brought against the defendant railroad by the widow of the deceased railroad employee for the benefit of herself and the thirteen and a half year old son of the deceased by a former marriage, the widow having been first confirmed as personal representative. The minor son's mother, his natural guardian, filed a petition asking the Court to vacate its order of apportionment between the widow and the minor son of the decedent made in connection with the compromise settlement reached. Her request was denied and an appeal was taken. The issues as posed in *Stark* are related in the reported opinion as follows:

> "On this appeal Helen Eggers Stark complains of the procedure used by the Court in arriving at the appointment, but her real complaint is that her son did not receive a larger share of the settlement fund. She seeks a reversal of the judgment so that another hearing may be held and a different apportionment made.
>
> "This action was brought under the Federal Employer's Liability Act by the administratrix for the benefit of the surviving widow and minor son. Any recovery is not for the benefit of the estate of the deceased, nor is it an asset thereof, but is for the personal benefit of the beneficiary or beneficiaries designated by the statute. The administratrix did not sue by reason of her inherent right as representative of the estate, but by virtue of the statutory designa-

tion and as trustee for the benefit of persons upon whose behalf the statute authorizes recovery. Although the act provides for an apportionment of the recovery between the widow and the son of the deceased in the case at bar, it is silent as to who should make the apportionment and specifies no procedure for the determination of that question.

"The District Court had jurisdiction over the main controversy. It had power to decide upon matters incidental or ancillary to that controversy. We hold that the trial judge had authority to apportion the settlement fund between the widow and son (citations omitted)."

The Court went on to dispose of the former wife's contention that an apportionment proceeding was invalid because she did not have her personal attorney participating in same by stating that there is no question but that plaintiff's counsel (referring to the attorney for the administratrix) had the power to submit the case and the issues of the law suit to any jury chosen to try the case and therefore was authorized to submit the question of apportionment to the Court. As to the amount apportioned, the Court noted that the minor son had received no support whatsoever from his deceased father since separation by the deceased father from his former wife except for involuntary payments made by the Armed Forces via a dependent's allotment while the deceased served in the Armed Forces. On the contrary, the deceased's personal representative, his second wife and widow, received his entire pay check each week from him from

which she paid all living expenses of both she and the decedent after giving him back a small sum for personal expenses. The Court thereupon approved the apportionment made by the District Court of $22,000 after attorney's fees to the widow and $6,000 to the minor son.

The facts in the *Stark* case have a familiar ring to them when compared with the facts herein.

In the instant case, Rodney Smith, as the personal representative of his deceased brother and therefore the person designated under the F.E.L.A. as the sole party permitted to sue and prosecute the claims asserted for his death, entered into stipulations of fact with the various defendants enabling the Court to render judgment without formal trial on the merits provided the Court approved of the division of funds and the stipulations of fact entered into so as to be able to render a judgment.

Based upon the stipulation of facts entered into by the only parties litigant involved herein with standing to sue and be sued in connection with these claims, the Court made specific findings of fact and conclusions of law allocating various sums amongst all the surviving beneficiaries of the decedent John B. Smith.

It is appropriate to point out that Irene Hanks Smith and the interests and beneficiaries she represents received the bulk of the sums paid under the judgment rendered based upon the stipulations of fact. Notwithstanding this Irene Hanks Smith objects to the natural

or illegitimate child of her former husband, John B. Smith, receiving anything from the Court in connection with his death.

However, the record will reflect that Cheryl Ann Smith was the youngest of all of the children, legitimate and illegitimate, of the decedent John B. Smith and the allocation was found as a matter of fact by the Court to be fair and just based upon all the filings made of record including the deposition of Irene Hanks Smith, the affidavits concerning the relationship of John B. Smith to the minor Cheryl Ann Smith, etc. and awarded a judgment based thereon. Indeed, the unopposed affidavits conclusively showed that John B. Smith and Carol Carpenter, the mother of Cheryl Ann Smith, had been living together for over two years prior to the death of Smith.

The District Court's dismissal of the limited intervention it had previously allowed in no way affected the rights of the intervenor. The full extent of the intervention allowed was for the *sole* purpose of allowing the intervenor to have her counsel present at trial (Appendix A). The order of the Court specifically held that the proper party plaintiff was Rodney Smith and the intervention was allowed only in an informal advisory manner (Appendix A.)

Intervenors were fully and ably represented at each stage of the proceedings below and all actions of the Court were either conducted in open court or after notice to intervenors. Thus all actions in this case together with their supporting facts have been known and open from inception to termination.

From the above and foregoing, it is respectfully submitted that it has been established beyond peradventure that the only person with standing to sue and prosecute this claim is necessarily the personal representative of the decedent John B. Smith, Rodney Smith, the original plaintiff herein. Irene Hanks Smith, et al, had no standing to sue either as individual plaintiffs in the separate suit such as that she brought in Texas, as co-plaintiffs along with Rodney Smith in this action, or as intervenors herein and her petition of intervention individually and on behalf of her children was properly dismissed by the District Court.

The woof and the warp of this litigation is that a proposal was made by the defendants, petitioners herein, to Rodney Smith, the personal representative of the decedent who was solely vested with the right to prosecute the claims asserted herein for the death of John B. Smith, to consent to a judgment for a certain sum for that death, which proposal was accepted by the personal representative who was all times represented by counsel. Thereafter, based upon stipulations judicially entered into by the only parties litigant with standing to sue or be sued in this matter, the District Court made findings of fact and conclusions of law apportioning that amount amongst all of the surviving beneficiaries lawfully entitled to same and rendered judgment based upon those findings of fact and conclusions of law, which judgment was satisfied by the petitioners herein. In addition, a complete release of all claims was taken by petitioners from the only person authorized by the F.E.L.A., as carried over into the maritime field by the Jones Act, to sue on

the causes of actions statutorily created, namely the personal representative of the decedent, Rodney Smith.

It is respectfully submitted that the judgment of the Lower Court dismissing the intervention filed by a group of the surviving beneficiaries led by Irene Hanks Smith on the grounds that they had no standing to sue was eminently correct and the decision of the Fifth Circuit was erroneous. It is further submitted that the action of the personal representative of the decedent in prosecuting this claim which inherently implies the right to stipulate to any facts he deems beneficial to the prosecution of the claim and to enter into any agreements necessary to reduce same to a sum certain by either judgment or compromise is not subject to any monitoring by some of the beneficiaries or to their prior approval of his actions in order to be binding and valid insofar as third parties sued by the personal representative on behalf of the beneficiaries are concerned. To hold otherwise would necessarily require litigation by committee and would result in a proliferation of law suits for any single death with each beneficiary surviving having the right to bring a separate action in any Court where jurisdiction can be obtained without regard to where the personal representative designated by Congress as the person to prosecute the claim should have chosen to bring the action, all for the same death and on the same cause of action. It is for this very reason that Congress singled out and designated one person to bring an action on behalf of all surviving beneficiaries designated by statute in order to avoid just this sort of confusion and to narrow in the personality of one party litigant all power and authority in

connection with the claims of all surviving beneficiaries. In the case at bar, that person is Rodney Smith and Rodney Smith alone.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been forwarded to Mr. John Gano, Jamail and Gano, 700 Houston First Savings Building, Houston, Texas, and Mr. Bob F. Wright, Domengeaux and Wright, Post Office Box 3668, Lafayette, Louisiana.

This ____ day of July, 1972.

W. GERALD GAUDET

JAMES E. DIAZ

APPENDIX A

JUDGMENT

Filed February 9, 1971

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

RODNEY SMITH, As administrator and representative of the Estate of JOHN B. SMITH

versus Civil Action No. 12890

CLARK SHERWOOD OIL FIELD CONTRACTORS, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, QUINTANA PETROLEUM CORPORATION

This case having come on for hearing on a former day on Motion of Plaintiff to dismiss the intervention filed herein by Irene Smith, and the Court having considered the pleadings, the law and the affidavits filed herein and being of the opinion that the law and the affidavits are in favor of Plaintiff and being of the further opinion that there is no just reason for delay in rendering this judgment;

It is ORDERED, ADJUDGED and DECREED that the intervention filed herein by Irene Smith be, and it is hereby, dismissed; said dismissal is expressly directed to be a final judgment and pursuant to and in

compliance with the provisions of Federal Rule of Civil Procedure 54(b);

It is further ORDERED, ADJUDGED and DECREED that the child, Cheryl Ann Smith, be and she is hereby held to be a child of the deceased, John B. Smith, and as such is entitled to and has the status of a surviving beneficiary of the deceased, John B. Smith, pursuant to the provisions of the Federal Employer's Liability Act;

It is further ORDERED, ADJUDGED and DECREED that Plaintiff, Rodney Smith, retain without disbursing, any and all settlement funds that he may receive as a result of the compromise of this suit, such funds to be retained by Rodney Smith and invested for the benefit of the beneficiaries, until all legal delays for appeal have elapsed or if an appeal is taken, until final judgment is rendered in this case.

To these rulings Intervenor duly and timely excepted.

THUS DONE AND SIGNED at Lafayette, Louisiana this 9th day of February, 1971.

/s/ Edwin F. Hunter Jr.
U. S. DISTRICT COURT
JUDGE

SUBMITTED BY:
DOMENGEAUX, WRIGHT & BIENVENU

By s/ Mark Bienvenu
MARK BIENVENU
P. O. Box 3668
Lafayette, Louisiana 70501
Attorney for Plaintiff

Approved as to form only, and subject to Intervenor's objection to these rulings, and objection that this form of adjudication is not applicable to her intervention:

JAMAIL AND GANO

By s/ John Gano
JOHN GANO
700 Houston First Savings Building
Houston, Texas 77002
Attorney for Intervenor, Irene Smith

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed February 9, 1971

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

RODNEY SMITH, As administrator and representative of the Estate of JOHN B. SMITH

versus Civil Action No. 12890

CLARK SHERWOOD OIL FIELD CONTRACTORS, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, QUINTANA PETROLEUM CORPORATION

This matter having come on for hearing on the pleadings, the stipulations entered into by the parties and the exhibits attached, and the Court having considered same, the plaintiff, his attorney and attorney for defendants were present, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1.

That the decedent, John B. Smith, was a resident of the full age of majority of Lafayette Parish, Louisiana, and defendants, Clark Sherwood Oil Field Con-

tractors, Employers Mutual Liability Insurance Company of Wisconsin, Quintana Petroleum Corporation and Royal Globe Insurance Company are corporations authorized to do and doing business in the State of Louisiana.

2.

The Court adopts as findings of fact those facts set forth in Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 of the stipulations entered into by and between the parties.

CONCLUSIONS OF LAW

1.

The Court has jurisdiction in the premises.

2.

At the time of the accident herein; plaintiff was in the course and scope of his employment with Clark Sherwood Oil Field Contractors and was employed as a seaman and a member of the crew of the M/V Anna Lee which was in navigation on navigable waters of the United States of America and was injured in the furtherance of his duties as such.

3.

The accident herein was caused in part by the negligence of the employees and agents of Clark Sherwood Oil Field Contractors and in part by the unseaworthiness of the M/V Anna Lee which was owned and/or controlled by Quintana Petroleum Corporation.

4.

Plaintiff is entitled to judgment herein against Clark Sherwood Oil Field Contractors, Employers Mutual Liability Insurance Company of Wisconsin, Quintana Petroleum Corporation and Royal Globe Insurance Company jointly and in solido in the sum of FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS for damages, wages, bonuses, maintenance, cure, loss of support, loss of companionship, loss of guidance and nurture (of which $25,000 is to be paid by Employers Mutual Liability Insurance Company of Wisconsin for itself and its insured, Clark Sherwood Oil Field Contractors and $25,000.00 is to be paid by Royal Globe Insurance Company for itself and its insured, Quintana Petroleum Corporation) which sum is to be distributed as follows:

Linda Fay Smith	$ 2.500.00
John Smith	3.500.00
Jenell Smith	5,000.00
James Smith	6,000.00
Irene Hanks Smith	12,000.00
Cheryl Smith	21,000.00

5.

Recovery under the Jones Act and the General Maritime Law is the exclusive remedy of Rodney Smith, for and on behalf of the aforementioned survivors and any and all other persons, to the exclusion of any and all remedies under the Louisiana Workmen's Compensation Act, LSA 23:1021, et seq, or under Article 2315 of the Louisiana Civil Code or under the Longshoremen

and Harbor Workers Compensation Act, 33 U.S.C.A. 901, et seq., or under other laws, all of which give no remedy or rights to plaintiff or any other survivors of the decedent under the facts and circumstances in this case.

THUS DONE AND SIGNED at Lafayette, Louisiana, this 9th day of Feb., 1971.

/s/ Edwin F. Hunter Jr.
U. S. DISTRICT JUDGE

JUDGMENT

Filed February 9, 1971

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

RODNEY SMITH, As administrator and representative of the Estate of JOHN B. SMITH

versus Civil Action No. 12890

CLARK SHERWOOD OIL FIELD CONTRACTORS, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, QUINTANA PETROLEUM CORPORATION

The matter having come on for hearing, and the Court having considered the pleadings, the stipulations and other evidence filed herein, and having made

findings of fact and conclusions of law based thereon, and being of the opinion that the law and the evidence are in favor of plaintiff:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, Rodney Smith, as administrator and representative of the estate of John B. Smith, and against defendants, Clark Sherwood Oil Field Contractors, Employers Mutual Liability Insurance Company of Wisconsin, Quintana Petroleum Corporation and Royal Globe Insurance Company in the full sum of FIFTY THOUSAND AND NO/100 ($50,000.00) DOLLARS ($25,000.00 to be paid by Clark Sherwood Oil Field Contractors and Employers Mutual Liability Insurance Company of Wisconsin and $25,000.00 to be paid by Quintana Petroleum Corporation and Royal Globe Insurance Company) which sums are to be distributed to the survivors as follows:

Linda Fay Smith	$2,500.00
John Smith	3,500.00
Jenell Smith	5,000.00
James Smith	6,000.00
Irene Hanks Smith	12.000.00
Cheryl Smith	21,000.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition filed herein be dismissed, with prejudice, at the cost of defendants.

Judgment Read, Rendered and Signed on this 9th day of Feb., 1971, at Lafayette, Louisiana.

/s/ Edwin F. Hunter Jr.
U. S. DISTRICT JUDGE

APPROVED:

DOMENGEAUX, WRIGHT & BIENVENU
BY s/Mark Bienvenu
MARK BIENVENU, Attorney For Plaintiff

DAVIDSON, MEAUX, ONEBANE & DONOHOE
BY s/T. J. McNamara
TIMOTHY J. McNAMARA, Attorney For
Clark Sherwood Oil Field Contractors
and Employers Mutual Liability
Insurance Company of Wisconsin

VOORHIES, LABBE, FONTENOT, LEONARD & McGLASSON
BY s/Gerald Gaudet
GERALD GAUDET, Attorney for
Quintana Petroleum Corporation and
Royal Globe Insurance Company

CLARIFICATION OF RULINGS DATED MARCH 3rd AND MARCH 25, 1970

Filed April 16, 1970

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

RODNEY SMITH, As administrator and representative of the Estate of JOHN B. SMITH

versus Civil Action No. 12890

CLARK SHERWOOD OIL FIELD CONTRACTORS, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, QUINTANA PETROLEUM CORPORATION

On February 26th, the court permitted the intervention of Irene Smith, surviving widow of John B. Smith, mother of Linda Fay Smith, John Hubert Smith, Janell Smith and James Bobby Smith, in this suit brought by the brother of the decedent, John B. Smith, as personal representative of the estate, under the Jones Act and the general maritime law. In addition to the above-named widow and children, the suit brought by Rodney Smith includes as a Jones Act beneficiary Cheryl Ann Smith, a child of the decedent resulting from the relationship which existed between John Smith and a woman with whom he lived in Louisiana at the time of his death. Thereafter, the intervenor filed her petition, causing service to be made on all defendants. On March 25, 1970, the Court denied motions filed by defendants Clark Sherwood and Employers Mutual to dismiss the petition of intervention for failure to state a claim based on the proposition that Rodney Smith

was the only person qualified to file suit under the statute in question.

It is noted that intervenor qualified as administratrix of the Succession of John Smith in Texas. Rodney Smith was qualified under the laws of Louisiana, where the deceased resided at the time of his death. The question as to who is the proper legal representative of the estate of the deceased in this case has been litigated and settled *adversly* to the intervenor in the courts of Louisiana, and Rodney Smith was recognized as the administrator of his brother's estate.

Since the parties seem to entertain some doubt as to the status of the intervenor in this case, we now clarify those previous rulings and specifically hold that the proper party plaintiff in this litigation is Rodney Smith. His suit is brought in behalf of all of the surviving beneficiaries. Each beneficiary will recover the pecuniary losses due him or her in event of a favorable verdict, and Mr. Smith, as administrator of the estate, is bound by his oath and the laws of Louisiana and of the United States, to fairly and properly present their claims. Recovery by him will be in a fiduciary capacity. Since the intervenor in her motion and in brief contends that Smith will not properly do this, the intervention was permitted for the sole purpose of permitting her counsel to be present at the trial, to see that her interest and the interest of the minor children who are issue of her marriage to the deceased are protected. To this end, intervenor may assist the plaintiff Rodney Smith in presenting evidence of pecuniary losses as well as any evidence she may have touching upon the liability of the defendants. There is no conflict of interest between intervenor and Cheryl

Ann Smith as a beneficiary such as would require this court to permit her to prosecute her action independently of the suit already filed in her behalf by the recognized personal representative of the decedent's estate. The amount of recovery for each beneficiary will be limited only by the proof of pecuniary losses resulting to the individual in question.

Nothing in the previous rulings of the court was intended to limit or restrict in any way the power and authority of Rodney Smith, original plaintiff in this case, to conduct this litigation through his counsel of record. It is strongly recommended by the court that all counsel cooperate fully in fairly and completely presenting all pertinent evidence, and if a compromise settlement can be reached, that they further cooperate in arriving at a just distribution of the amount to be paid by the defendants in this case.

It is now settled law in this Circuit that Cheryl Ann Smith may recover pecuniary losses resulting to her from the death of her natural father. See: *Hebert v. Petroleum Pipe Inspectors, Inc.*, 396 Fed. 2d 237 (1968).

As we originally pointed out when the intervention was permitted, intervenor will bear all of the expenses of her own counsel for this representation, and the fees of the attorneys representing Rodney Smith in accordance with their agreement with him are not to be diminished.

Lafayette, Louisiana, this 16th day of April, 1970.

/s/ R. J. Putnam
UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1570
Summary Calendar*

RODNEY SMITH, ET AL.,
Plaintiffs,

IRENE HANKS SMITH, surviving widow of John B. Smith, deceased, etc., ET AL.,
Intervenors-Appellants.

versus

CLARK SHERWOOD OIL FIELD CONTRACTORS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(February 9, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

MORGAN, Circuit Judge: In this suit under the Jones Act, 46 U.S.C. § 688, the personal representative

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*Rule 18, 5th Cir.; See *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 5 Cir., 1970, 431 F. 2d 409, Part I.

of a deceased seaman seeks to recover death benefits on behalf of the lawful wife and children and also for a child alleged to be the illegitimate daughter of the deceased. The district court granted recovery by adopting stipulations signed by the personal representative and the defendant companies. On the same day the court dismissed the petition for intervention previously granted to the lawful wife and children. Having determined that this case involves two classes of beneficiaries with competing and adverse interests, we reverse the judgment of the district court and the order dismissing intervention.

John B. Smith was employed as roustabout by Clark Sherwood Oil Field Contractors. On April 11, 1967, at the age of 35, Smith drowned while performing work for his employer on a ship owned by Quintana Petroleum Corporation. At the time of his death, Smith was cohabiting in Louisiana with Carol Carpenter and her two-month old daughter, Cheryl Ann Smith, who was allegedly fathered by John Smith. For two years prior to his death, Smith's lawful wife and four legitimate children had been living apart from him in Houston, Texas.

Thirteen days after the fatality, John Smith's brother, Rodney Smith, petitioned the state court in Louisiana to have himself appointed as administrator of the estate. The court granted the petition, and on May 11, 1967, Rodney filed suit in federal district court in Louisiana demanding recovery under the Jones Act, supra, in his capacity as personal representative for

the decedent's beneficiaries. In his federal complaint, Rodney stated that Cheryl Ann Smith was in fact the minor child of the deceased and therefore entitled to compensation along with the wife and the four legitimate minor children. Named as defendants in the suit were Clark Sherwood Oil Field Contractors and its insurance carrier, Employers Mutual Liability Insurance Company of Wisconsin, and the Quintana Petroleum Corporation (hereinafter referred to collectively as defendants).

Some five months later the widow, Irene Smith, filed suit in Louisiana state court to replace Rodney Smith as administrator, claiming she was entitled to administer her husband's estate. Although noting that the "widow makes extremely equitable arguments", the Court of Appeal of Louisiana rejected her contentions and upheld Rodney's appointment. *Succession of Smith* (Ct. of Appeal of Louisiana, Third Circuit, 1969) 219 So. 2d 291, 292.[1]

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[1]In denying the widow relief, the Louisiana court stated as follows:

> "The widow makes extremely equitable arguments. She points out that the brother was able to secure appointment unopposed, by moving hastily and without notice. LSA-CCP Art. 3094.[1] She further points out that the apparent reason for her husband's brother's applying so swiftly to obtain the appointment as administrator of her husband's estate was to control assertion of a federal Jones Act claim as the seaman's 'personal representative', 46 U.S.C.A. § 688, despite the circumstance that damages recovered by such personal representative are statutorily designated as being for the benefit of the surviving widow and children of the decedent.
>
> "[1] Nevertheless, wisely or unwisely, under the 1960 Code of Civil Procedure, the widow was not

Failing in this attempt, the widow had herself appointed administratrix of the decedent's estate in Texas and there filed a Jones Act suit in an attempt to recover for the death of her husband.

However, the Texas suit was apparently abandoned when the widow filed a petition to intervene in the Louisiana federal suit contending that Rodney Smith was not adequately representing the interest of herself and her four children. Specifically, Irene Smith claimed that Cheryl Ann Smith was not the natural child of the deceased, and, consequently, Cheryl was not entitled to any compensation as a beneficiary. Initially the district judge allowed Irene Smith to intervene even though her petition for intervention was at all times opposed by Rodney Smith and the defendants.

In the meantime, Rodney Smith began negotiations with the defendants in an attempt to reach a settlement of all claims arising from the death of John Smith. Finally the parties signed stipulations in which it was agreed that Cheryl Ann Smith was the natural child of the decedent. The defendants admitted liability in

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entitled to notice that someone else had applied for and received ex parte appointment as administrator of her husband's estate. To receive such notice and an opportunity to contest the appointment of another as administrator an interested person must file a petition to receive such notification within ten days after the decedent's death (or at least prior to the application of another for appointment). LSA-CCP Arts. 3091, 3094. See Succession of Houssiere, La. App. 3rd Cir., 146 So. 2d 483."
219 So.2d at 292.

the amount of $50,000.00[2] to be distributed to the beneficiaries as follows:

Irene Hanks Smith	(widow)	$12,000.00
Linda Faye Smith	(legitimate child)	2,500.00
John Smith	(legitimate child)	3,500.00
Jenell Smith	(legitimate child)	5,000.00
James Smith	(legitimate child)	6,000.00[3]
Cheryl Ann Smith	(allegedly illegitimate child)	21,000.00

These stipulations were presented to the court together with two affidavits which alleged that the deceased had publicly acknowledged Cheryl Ann Smith to be his child, and that the deceased was supporting the child up until the date of his death.[4] One of the affi-

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[2]One-half of this amount was to be paid by Clark Sherwood Oil Field Contractors and the other half was to be contributed by Quintana Petroleum Corporation.

[3]It is undisputed by the defendants that James Smith was mentally deficient and required to attend a special class at school.

[4]The affidavit of Rodney Smith is reproduced below. The content of the other affidavit was identical.

"

AFFIDAVIT

(Filed Oct. 28, 1970)

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned Notary Public, personally came and appeared:

RODNEY SMITH

Who after being duly sworn, deposed and said that he was personally and well acquainted with JOHN D. SMITH, CAROL CARPENTER and CHERYL ANN SMITH: that at the time of his death, JOHN D. SMITH was living with the said CAROL CARPENTER and had been living with the said CAROL CARPENTER for at least a year prior to this death; that a child was born to the said CAROL CARPENTER approximately four weeks prior to the death of JOHN D. SMITH, said child being named CHERYL ANN SMITH: that the said JOHN D. SMITH acknowledg-

davits was signed by Rodney Smith, the personal representative in this lawsuit.

After considering the stipulations and the attached affidavits the district court entered an order which dismissed the intervention previously granted to Irene Smith. Apparently concluding that the question of Cheryl Ann Smith's paternity was no longer a litigable issue and that all conflict between the personal representative and the widow was resolved, the court stated as follows:

> "*Based upon the unopposed affidavits in the record,* the Court finds that the child, Cheryl Ann Smith, is a child of the deceased, John D. Smith, who was duly acknowledged by him tacitly, and as such, is entitled and has status as a surviving beneficiary of the deceased, John B. Smith, under the Federal Employer's Liability Act." (Emphasis supplied).

Subsequently, the district court entered judgment in favor of Rodney Smith and against the defendants. The court made findings of fact which adopted the factual allegations contained in the stipulations, and in its conclusions of law, the court followed the stipulations and awarded recovery in the amount of $50,000.00 to be

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ed the said CHERYL ANN SMITH to be his child, openly and publicly and was maintaining and providing for the said CHERYL ANN SMITH up until the date of his death.

s/ Rodney Smith

WITNESSES:
Mrs. Leon Smith
Pearl Broussard

"

distributed to each beneficiary in the same amounts as were agreed upon by Rodney Smith and the defendants. (See page 4 of opinion, supra).

On the same day judgment was rendered, the court entered a formal order which again stated that the intervention of Irene Smith was dismissed, and that Cheryl Ann Smith was the natural child of the decedent.

In summary, the result of the judgment entered by the district court was that Irene Smith was effectively ousted from the lawsuit and Cheryl Ann Smith was held to be the deceased's child and allowed to participate in the recovery with the five other undisputed beneficiaries. For the reasons that follow we hold that the court erred in its decision.

I.

At the outset we turn to the district court's holding, based upon "unopposed affidavits in the record", that Cheryl Ann Smith was the child of the deceased. Although not contained in the printed appendix nor cited by either party to this appeal, there was evidence in the record before the district court which clearly controverted what was alleged in the affidavits. When questioned by defendants' counsel on deposition, Irene Smith had the following to say concerning the paternity of Cheryl Ann Smith:

> Q. Now, Mrs. (Irene) Smith were you aware at some of this time since 1964, that he (John Smith) was living with another woman in Louisiana?

A. Yes, sir.

Q. All right. Did you realize or have any indication that they also had a child?

A. Well, that I couldn't tell you, sir.

Q. Well, have you heard? I realize you might not know for sure, but had you heard anything to indicate to you that had happened?

A. I'll put it to you this way, they said it was, but *I don't believe my husband could have any more kids.*

Q. All right. What is your reason for believing he could not?

A. *Because my baby was, let's see, he was six and I didn't have any more after that. And I was always getting pregnant, because as you can see, my kids are real close.*

(Emphasis supplied).

Obviously, these statements, combined with the affidavits, created a factual issue which the intervenor was entitled to have adjudicated in open court rather than disposed of summarily by the district judge.[5] The holding that Cheryl Ann Smith is the child of John Smith is reversed.

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[5]Although not necessary to support the holding in this case, we note in passing that Irene Smith objected to the statements in the affidavits (see Note 3, supra) in her exceptions to the court's dismissal of her petition for intervention. This objection by itself would seem to merit an evidentiary hearing in order to afford the widow an opportunity to cross-examine the authors of the affidavits.

II.

Next, we come to the more difficult question of whether Rodney Smith, or any other single representative, could adequately represent all the alleged beneficiaries under the circumstances of this case.

The Jones Act, supra, gives the personal representative of a deceased seaman the right to maintain an action for damages against the decedent's employer when the fatal injury occurred in the course of the decedent's employment. By its terms the statute incorporates the provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-59, which makes common carriers, and therefore shipowners, liable to the deceased employee's personal representative "for the benefit of the surviving widow ... and children of such employee". 45 U.S.C. § 51. The word "children" as used in this statute includes illegitimate children as well as legitimate children so that Cheryl Ann Smith, if she is indeed the child of John Smith has a cause of action for damages under the Jones Act, supra. See *Levy* v. *Louisiana*, 1968, 391 U.S. 68, and *Hebert* v. *Petroleum Pipe Inspectors, Inc.*, 5 Cir. 1968, 396 F. 2d 237.

The district court seemed to be of the opinion that Cheryl's alleged right of recovery would have no effect on the amounts the other beneficiaries might receive, and that her paternity was a matter of conflict solely between the personal representative and the defendant companies. In an order[6] clarifying previous rulings, the court stated:

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[6]The order was entitled "Clarification of Rulings Dated March 3rd and March 25, 1970".

> "There is no conflict of interest between intervenor and Cheryl Ann Smith as a beneficiary such as would require this court to permit her to prosecute her action independently of the suit already filed in her behalf by the recognized personal representative of the decedent's estate. The amount of recovery for each beneficiary will be limited only by the proof of pecuniary losses resulting to the individual in question."

We disagree with this view since an examination of the pertinent authorities reveals that the widow and legitimate children have substantially adverse interest to Cheryl Ann Smith, both in regard to her status as a beneficiary and in regard to the amount she might recover in the event she is found to be the daughter of the deceased.

As the Supreme Court has observed, the personal representative's cause of action is based upon "a liability for the loss and damage sustained by relatives dependent upon the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only". *Michigan C.R. Co.* v. *Vreeland,* 1913, 227 U.S. 59, 68. The manner in which this pecuniary damage is measured is well illustrated by the case of *Petition of Risdal & Anderson, Inc.* (D. Mass., 1968) 291 F. Supp. 353, which involved numerous claims by relatives of the seamen who died when the MIDNIGHT SUN was lost at sea with all hands on board. In each instance the calculation of pecuniary loss was based upon a reasonable prediction of how much financial support and personal guidance a particular beneficiary

would have received had the decedent lived. In making this determination, the district judge considered many factors such as the number of dependents in a family, the estimated income of the deceased, the probability of a child attending college, the amount of time the deceased would have spent with his children and the decedent's past history of contributions to his dependents.

Applying these standards to the case at hand, it is at once clear that Rodney Smith could not adequately represent both Cheryl Ann Smith and the other beneficiaries in the same lawsuit. The amount Cheryl Ann Smith is entitled to recover, if any, is dependent upon her showing, first, that she is the daughter of the deceased, and secondly, that the deceased probably would have contributed something to her support. Assuming she could make this proof, Cheryl's best case would be to prove that the deceased planned to support her until adulthood and never again spend any of his income on his lawful family. Conversely, the widow and the legitimate children could obtain their maximum recovery by presenting evidence that Cheryl was not the child of the deceased; or, if she was, that the deceased intended to return to his lawful family in Texas and not support or maintain Cheryl.[7] But regardless of the validity of either of these theories, the assertion of one necessarily argues for a diminution

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[7]This statement is more than idle speculation as to claims that might be asserted by Irene Smith. In her deposition Mrs. Smith testified that the decedent informed her daughter, two weeks before his death, that he desired to come back to his family.

of recovery under the other. We fail to see how one representative could adequately pursue both claims.[7A]

As personal representative Rodney Smith negotiated with the employers of the deceased and, without the consent of Irene Smith, agreed upon certain facts which the widow t all times disputed. The widow's principal objection was to the agreement that Cheryl Ann Smith was the dependent child of the deceased and entitled to recover $21,000.00 of his future income. However, the stipulations went on to recite:

> "As further shown by the aforesaid deposition [of Irene Smith], the said Irene Hanks Smith and the four (4) children mentioned hereinabove lived separate and apart from the said John B. Smith for approximately two (2) years before his death on April 11, 1967, and received no support whatsoever from the de-

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[7A]It is the view of the dissenting opinion that at best only a "bare possibility" exists that the deceased would have ever returned home. We would hesitate to call such a possibility "bare" in any case where a man has been living apart from his wife and four children for a period of only two years. But in any event, the flaw in this reasoning is that it ignores the widow's claim that she is entitled to an adjudication by the trier of fact on the crucial question of which family would have received the decedent's future support. The widow's proof on this issue may well be lacking and she may end up recovering nothing. But we cannot deprive her of her day in court on this issue by speculating as to what she might or might not be able to prove once she becomes a party to this litigation. Certainly the deposition of the widow taken by attorneys for Quintana Petroleum does not foreclose the possibility that the widow may be able to successfully argue to the trier of fact that she would have received all the support.

cedent, and, in fact, never saw decedent during those years."

This statement is in error. In her deposition Mrs. Smith specifically testified that she and her children visited with the deceased one week before his death and that the deceased purchased clothes and toys for the children and gave them what money he could afford.

The inconsistencies between the stipulations and the deposition merely demonstrate the type of problems that may be expected when one representative is allowed to pursue and settle two claims which have the potential of becoming mutually exclusive of one another. In this case we emphasize the fact that, at the time of his death, the deceased seaman was living in Louisiana with another woman and their allegedly illegitimate child, while his lawful family resided separately, several hundred miles away in Texas. If the defendants are liable, the crucial question here is how much of the decedents' income and guidance each family probably would have received had the decedent lived. Yet throughout these proceedings the widow has been deprived of an opportunity to assert, and if necessary to litigate, factual issues which bear heavily on this important question. It is, of course, true that the widow was allowed to intervene temporarily prior to the court's judgment removing her from the lawsuit. However, the district court's final order, adopting most of the stipulations and apportioning recovery in exactly the same manner as the parties agreed upon, makes it plain that this controversy was worked out during negotiations between Rodney Smith and the defend-

ants. The widow was not a party to the negotiations nor did she sign the settlement agreement or accept the court's judgment. Under these circumstances, we hold that Rodney Smith could not have adequately represented the interest of the widow and her children in his meetings with the defendants while at the same time advocating recovery for Cheryl Ann Smith.

In their joint brief on appeal the defendants cite several Supreme Court cases* for the proposition that the personal representative has the sole power to litigate, settle, and compromise all claims a decedent's beneficiaries may have under the Jones Act, supra Nevertheless, none of these cases even remotely confront the issue of what a federal court is to do when a seaman dies and leaves behind two classes of dependents with patently conflicting interests. In *Petition of Sandra & Dennis Fishing Co.* (D. Mass., 1962) 209 F. Supp. 835, the court found a conflict of interest between the personal representative and the minor child of the deceased seaman, and the shipowner argued that the Jones Act, supra, vested the personal representative with exclusive authority to sue. The district judge rejected this argument and held that the child (through a next friend) could maintain her claim independently of the personal representative. And in *In Re Petition of Risdal & Anderson, Inc.*, (D. Mass., 1967) 266 F. Supp. 157,* the court refused to allow a separate suit

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*American Railway Company of Porto Rico v. Birch, 1912, 224 U.S. 547; St. Louis, San Francisco & Texas Railway Co. v. Seale, 1913, 229 U.S. 156; Lindgren v. United States, 1930, 281 U.S. 38.

*This is another case which arose from the sinking of the MIDNIGHT SUN, referred to in the body of this opinion, supra.

by anyone but the personal representative, but it did so on the ground that there was *no conflict of interest* between the decedent's administrator and the dependent child's next friend:

> "With reference to the question whether the child's next friend is one authorized to file a claim on his behalf, a claimant's right of action under the applicable statutes is ordinarily vested in the personal representative of the decedent. 46 U.S.C. §§ 688, 761. In this instance, the decedent was unmarried and there is no conflict of interest or ill-feeling between the child's representative and the administrator of the decedent's estate such as would warrant an exception to the rule."
> 266 F. Supp. at 159.

In our view these two decisions give the only reasonable interpretation to the statute as passed by Congress. While the Jones Act, supra, does state in singular form that the "personal representative .... may maintain an action at law",[10] the statute also requires that the action be brought *"for the benefit of* the surviving widow . . . and children".[11] (Emphasis supplied). In the case at hand the conflicting nature of the beneficial interests prevented the personal representative from acting for the benefit of all the alleged beneficiaries and the result was that a fiduciary was charged with a duty that he could not effectively perform. Such an illogical result could not have been the intent of Congress.

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[10] 46 U.S.C. § 688.
[11] 45 U.S.C. § 51.

Having concluded that Irene Smith and her four children are not adequately represented by Rodney Smith, it follows that she qualifies for intervention of right under the literal terms of Rule 24(a) (2) of the Federal Rules of Civil Procedure, Title 28, U.S.C.[12]

The district court's order dismissing the petition of intervention filed by Irene Smith is hereby reversed and the cause remanded with directions that Irene Smith be allowed to intervene on behalf of herself and as next friend for her four minor children. If she so desires Irene Smith is entitled to a jury determination on the question of whether Cheryl Ann Smith is in fact the child of John Smith. In the event it is determined that Cheryl Ann Smith is a qualified beneficiary, Irene Smith, must be afforded an opportunity to present evidence concerning the amount of support she and her children would have received if John Smith had lived.

The district court's judgment approving the settlement agreement between Rodney Smith and the defendants is reversed with directions that no agreement may be approved by the court unless Irene Smith is a party thereto.

REVERSED AND REMANDED

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[12]Rule 24(a)(2) provides as follows:

> "Upon timely application anyone shall be permitted to intervene in an action: . . . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

THORNBERRY, Circuit Judge, dissenting: I respectfully dissent. With all deference to the majority, I believe its opinion flows, albeit charitably, from a misapplication of the facts and law involved in the instant case.

The facts as set out by the majority opinion are largely undisputed. We have here a simple case of a beneficiary's lack of satisfaction with a settlement and stipulations entered into by deceased's personal representative. Deceased's wife and legitimate children complain of their inability to intervene in this Jones Act case in order to protect their interests.

The majority first reverses the district court's holding, "based on unopposed affidavits in the record," that Cheryl Ann Smith was the child of the deceased. This is premised on the conclusion that Irene Smith in her deposition disputed Cheryl Ann's status as the child of deceased and was thus entitled to have the disputed fact issue fully adjudicated in open court rather than disposed of summarily by the district judge.

The majority quotes from Irene Smith's deposition to support its allegation of a factual dispute. In my opinion the quoted language on its face shows no fact on which we can base an assumption that Cheryl Ann was not the child of deceased. The only reason given for Mrs. Smith's belief that Cheryl Ann was not her husband's child was the fact that she and deceased had not had any children during the past few years,

two of which years deceased had spent with his mistress. We are invited to infer from this phenomenon that deceased was incapable of having children at the time of Cheryl Ann's birth. Any such inference, in light of the infinite number of possible explanations for deceased's lack of productivity during these years, can only be classified as self-serving, idle speculation supported by less than a scintilla of evidence.

Aside from my factual dispute with the majority, I question what difference it makes. The district court's judgment was not premised on *undisputed* facts; rather, it was based on facts *stipulated* by the personal representative of deceased, the party to this suit specifically empowered under the Jones Act to bring suit, to stipulate to facts, to enter into settlements, and to accomplish all other acts necessary to protect the interests of the beneficiaries.

If this Court is to reverse this case, it must do so on the sole basis that Rodney Smith, as deceased's personal representative, *could not* adequately represent the interests of all the beneficiaries under the circumstances of the instant case. Only if Irene Smith is deemed to have the right to intervene is there any factual dispute to be resolved. Only then is the standard of review on motion for summary judgment applicable.

The majority next fully and adequately sets forth the applicable principles defining the sole power of the deceased's personal representative to litigate, settle, and compromise the claims of Jones Act benefi-

ciaries. I fully agree with the majority position that were there a conflict of interests among the beneficiaries sufficient to defeat the statutory purpose of the Jones Act in granting an action for the benefit of the surviving widow and children, the district court would have no discretion to deny the right of intervention to the unprotected beneficiary. This right to intervene, however, does not flow from the *refusal* of the personal representative to represent adequately all interests; it must be the result of his *inability* to do so.

I fail to find a single irreconcilable, relevant conflict present in the instant case sufficient to make the representative incapable of representing all interests. Irene Smith in her brief complains of the following stipulations, which allegedly indicate the conflict facing the personal representative:

(1) Irene Smith and her four children lived separate and apart from deceased for two years prior to his death, during which time deceased lived with his mistress several hundred miles away.

(2) Deceased's legitimate family received no support from deceased during this period of time.

(3) Deceased never saw his family during this period.

(4) Out of the unholy alliance of John Smith and his mistress was born Cheryl Ann Smith.

(5) Cheryl Ann Smith lived with and was dependent on deceased from the time of her birth until deceased's death.

(6) The total pecuniary damage to the beneficiaries was found to be only $50,000.

Not a single fact found in the record contradicts the stipulation that deceased chose to live with his mistress, in lieu of his wife, during the last two years of his life. This is so despite the fact that Mrs. Smith participated in all stages of the district court proceedings prior to the settlement agreement. Likewise, there are no facts which tend to question deceased's failure to support his "legitimate" family in any meaningful way during this period. There is no conflict among the beneficiaries as to the veracity of these stipulations. They are objectively proven facts which fully support the equity of the settlement agreement and the district court's acceptance thereof. It is thus difficult to see any prejudice to Mrs. Smith from her inability to intervene on these points.

Irene Smith does dispute the stipulation that deceased had no contact with his family during the two-year period prior to his death. She testified in her deposition that she and her children visited with the deceased one week prior to his death and that at time deceased purchased clothes and toys for the children and gave the family what money he could afford. Assuming the truth of this self-serving statement, which is supported by no other evidence in the record, it indicates at best only a bare possibility that the wan-

dering deceased would have ever returned to his family or have supported them in the future. Moreover, there is ample indication that this bare possibility of future benefit to Mrs. Smith and her children was more than adequately considered by both the personal representative and the district court in apportioning the recoveries. If this had not been the case, Mrs. Smith and her children would have recovered absolutely nothing, as their pecuniary loss would then have been zero. Instead, they received a total of $29,000 — well over half the total award. This indicates that the so-called "competing" claims of the beneficiaries not only could be, but were, adequately represented by the deceased's duly-appointed representative. Mrs. Smith and her children are entitled to no more.

There is a clear, factual conflict between the beneficiaries as to the status of deceased as Cheryl Ann's father, although, as previously stated, the factual basis for this conflict is questionable at best. As between the beneficiaries in the instant case, however, there is no conflict *of interests* involved. Whether Cheryl Ann is the child of deceased might present an interesting factual controversy, but the outcome of such an adjudication should make no difference to deceased's family save in their natural desire to protect his reputation. Proof that Cheryl Ann was not deceased's child would in no way rebut the only relevant fact stipulated — that for her entire life Cheryl Ann had been supported by deceased. This latter fact is not disputed by Mrs. Smith, and it is clear to me that its contradiction is the only method by which Mrs. Smith can increase her recovery.

There is no doubt that establishing that Cheryl Ann was not the child of deceased would prevent *her* recovery and diminish the total damages due from the defendants below. The fact remains, however, that these defendants are not complaining of the stipulation. Proof of deceased's lack of paternal connection to Cheryl Ann would not alter his apparent intent to support her — whether she was his child or the child of still another. Only if preventing Cheryl Ann's recovery indicated in some way that Mrs. Smith and her children could expect more future support from her husband could there be any merit to the contention that an irreconcilable conflict has been presented. It is enough to say that Cheryl Ann's failure to recover on the basis of her not being the child of deceased in no way indicates any such probability of increased future support to deceased's wife and natural children. The relevant criteria for damages in this case is not "legitimacy versus illegitimacy"; rather, it is "support versus non-support."

Finally, Mrs. Smith argues that the total recovery is inequitably low. This in no way indicates a contention that the personal representative *could not* represent all beneficiaries adequately; it is instead an allegation that he *did not* represent all of them adequately. No conflict of interests is shown here — all beneficiaries are interested in the total recovery which, assuming the same rate of distribution, would enrich them all. The total recovery relates to the issue of damages between the personal representative and the defendant below, an issue in which Mrs. Smith has no stake *vis-a-vis* the other beneficiaries. There is no

doubt that the personal representative *could have* represented all interests adequately by insisting on the maximum possible total recovery. The possibility that he *did not* do so, for whatever reason, is an issue to be raised in a suit against him for breach of fiduciary duty, not by a motion to intervene on the basis of conflicting interests of the beneficiaries.

Because I see no conflict between the interests of the beneficiaries in the instant case and recognize only a possibility that the personal representative in the instant case did not, rather than could not, adequately represent all such interests, I would affirm the judgment of the district court, leaving to Mrs. Smith the decision of whether she should bring a suit for breach of the representative's fiduciary duty.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1570

RODNEY SMITH, ET AL.,
Plaintiffs,

IRENE HANKS SMITH, surviving widow of John B. Smith, deceased, etc., ET AL.,
Intervenors-Appellants,

versus

CLARK SHERWOOD OIL FIELD CONTRACTORS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Feb. 9, 1972, 5 Cir.. 1972, ____ F.2d ____).

(April 17, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

THORNBERRY, Circuit Judge, dissenting:

I dissent to the denial of the petition for rehearing for the reasons stated in my dissent to the original opinion.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.